

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	EB Docket No. 03-200
Section 272(d) Biennial Audit of)	EB File No. EB-03-IH-0341
Verizon Communications, Inc.)	

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 2003

Released: December 5, 2003

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. In this Order, we deny an Application for Review filed on behalf of Verizon Communications, Inc. ("Verizon"). Verizon challenges a decision by the Enforcement Bureau ("Bureau")¹ denying Verizon's request for confidential treatment of information contained in its audit report filed under section 272(d) of the Communications Act of 1934, as amended (the "Act").²

2. Section 272 of the Act requires Bell Operating Companies ("BOCs") offering in-region, interLATA service to do so through a separate affiliate.³ Section 272(d) requires a BOC, after receiving section 271 authorization, to obtain a joint Federal/State audit conducted by an independent auditor to determine the BOC's compliance with section 272 and the Commission's rules.⁴ On June 11, 2001, Verizon submitted its first section 272(d) biennial audit report, which contained facts concerning the compliance of Verizon affiliates that were providing in-region, interLATA service in New York. Verizon sought confidential treatment of financial and accounting data, including performance measurements; the Commission denied the request.⁵ On June 12, 2003, Verizon submitted its second section 272(d) audit report.⁶ By letter dated June 12, 2003, attached to the audit report, Verizon requested confidential treatment of the performance

¹ *Section 272(d) Biennial Audit of Verizon Communications, Inc.*, EB File No. EB-03-IH-0341, Memorandum Opinion and Order, DA 03-2619 (rel. Aug. 8, 2003) ("*Section 272(d) Audit Order*").

² 47 U.S.C. § 272(d).

³ 47 U.S.C. § 272.

⁴ 47 U.S.C. § 272(d).

⁵ *See Accounting Safeguards under the Telecommunications Act of 1996: Section 272(d) Biennial Audit Procedures*, Memorandum Opinion and Order, 17 FCC Rcd 1374 ("*Verizon Confidentiality Order*"), *recon. denied*, Order on Reconsideration, 17 FCC Rcd 6955 ("*Verizon Reconsideration Order*") (2002).

⁶ The period of time covered by the audit was January 3, 2001 through January 2, 2003.

data, specifically the volumes of special access services purchased by Verizon's affiliates and non-affiliates, as well as the number of presubscribed interexchange carrier ("PIC") changes submitted by Verizon's long distance affiliates and other carriers.⁷ In the *Section 272(d) Audit Order*, the Bureau denied Verizon's request, based on the Commission's previous determinations regarding requests for confidential treatment of section 272(d) audit reports in the *Verizon Confidentiality Order* and the *SBC Confidentiality Order*.⁸ On August 14, 2003, Verizon filed an Application for Review.⁹

II. DISCUSSION

3. In this Application for Review, Verizon seeks confidential treatment of information relevant to its compliance with section 272 of the Act. Verizon contends that the Bureau's denial of its confidentiality request is "inconsistent with the Commission's previous decisions regarding the confidentiality of section 272 audit reports."¹⁰ As explained below, we find the Bureau's decision entirely consistent with Commission precedent. As we stated in previous section 272 orders addressing confidentiality, section 272(d)(2) mandates public disclosure of the section 272 audit results.¹¹ Indeed, section 272(d)(2)'s mandate reflects Congress's conclusion that the value of publicly available audit results outweighs any potential competitive harm resulting from such disclosure. We also conclude, as we have in the previous orders,¹² that disclosure is necessary to promote meaningful comment pursuant to section 272(d)(2) and will thereby help the Commission determine whether Verizon has complied with section 272 and the Commission's rules.¹³

4. We also agree with the Bureau that disclosure of information at issue is not likely to cause Verizon substantial competitive harm. The information at issue is not raw data, but aggregated information that summarizes and reformats more detailed findings on a state-wide

⁷ See Letter from Joseph DiBella, Regulatory Counsel, Verizon to Marlene H. Dortch, Secretary, Federal Communications Commission (June 12, 2003). These data in the audit report for which Verizon seeks confidential treatment are the volumes contained in the performance measure results in Attachment A, pages A-3 through A-79 and the PIC changes data in Appendix A, pages 80 and 81.

⁸ See *Accounting Safeguards under the Telecommunications Act of 1996: Section 272(d) Biennial Audit Procedures*, Memorandum Opinion and Order, 17 FCC Rcd 17012 (2002) ("*SBC Confidentiality Order*").

⁹ *Section 272(d) Biennial Audit of Verizon Communications, Inc.*, EB File No. EB-03-IH-0341, Application for Review (filed Aug. 14, 2003) ("Verizon Application for Review").

¹⁰ Verizon Application for Review at 1. Under section 1.115(b)(2) of the Commission's rules, applicants must demonstrate one of the following: that the action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy; that the action involves a question of law or policy which has not previously been resolved by the Commission; that the action involves application of a precedent or policy which should be overturned or revised; an erroneous finding as to an important or material question of fact; or prejudicial procedural error. See 47 C.F.R. § 1.115(b)(2).

¹¹ *Verizon Confidentiality Order*, 17 FCC Rcd at 1376, ¶ 5; *Verizon Reconsideration Order*, 17 FCC Rcd at 6956, ¶ 3.

¹² *Verizon Confidentiality Order*, 17 FCC Rcd at 1377-78, ¶ 8; *SBC Confidentiality Order*, 17 FCC Rcd at 17023, ¶ 33.

¹³ See *SBC Confidentiality Order*, 17 FCC Rcd at 17023, ¶ 33.

basis.¹⁴ Moreover, the information in the audit report is from 2001 and 2002, which further mitigates the likelihood of substantial competitive harm.¹⁵ In addition, Verizon's claim is conclusory and does not explain how the specific information at issue could cause likely competitive harm.¹⁶ Finally, we find that the public interest will be served by disclosure of the audit results.

A. Public Disclosure Requirement of Section 272(d)(2)

5. Verizon's first argument is that the Bureau erred in concluding that the plain language of section 272(d)(2) mandates public disclosure of the results in the audit report.¹⁷ Verizon contends that in the *SBC Confidentiality Order*, the Commission allowed SBC to redact the names of certain customers and vendors from the audit report, which contradicts the Bureau's conclusion that section 272(d)(2) mandates public disclosure.¹⁸ We do not agree with Verizon's interpretation. In the *SBC Confidentiality Order*, the Commission denied SBC's request for confidential treatment of the audit report. While it is true that the Commission allowed SBC to redact a very limited amount of information from its audit report (*i.e.*, company and vendor names), we based that determination on the fact that the information was irrelevant to SBC's compliance with section 272 (not that disclosure posed substantial competitive harm) and the Commission's rules and therefore was not properly section 272 audit results in the first place.¹⁹ As a result, this finding did not disturb the Commission's earlier conclusion in the *Verizon Confidentiality Order* that section 272(d)(2) requires public disclosure of the audit results.

B. Freedom of Information Act Exemption 4 and Commission Rules

6. Verizon next argues that the information identified as proprietary is exempt from disclosure under Exemption 4 of the Freedom of Information Act ("FOIA").²⁰ In light of our prior conclusion that section 272(d)(2) mandates public disclosure, we need not address these issues. Nevertheless, to provide a full response to Verizon and to make clear that our application of section 272(d)(2) here is consistent with our traditional confidentiality/FOIA analysis in other contexts, we will do so.

7. Under Exemption 4, commercial or financial materials are held to be confidential when disclosure would likely substantially harm the competitive position of the submitter.²¹ For

¹⁴ See *Verizon Confidentiality Order*, 17 FCC Rcd at 1377, ¶ 8.

¹⁵ See *Verizon Confidentiality Order*, 17 FCC Rcd at 1382, ¶ 19; *SBC Confidentiality Order*, 17 FCC Rcd at 17017, ¶ 15.

¹⁶ See *Verizon Confidentiality Order*, 17 FCC Rcd at 1381, ¶ 15; *SBC Confidentiality Order*, 17 FCC Rcd at 17018-19, ¶ 19.

¹⁷ Verizon Application for Review at 3.

¹⁸ *Id.* at 3-4, citing *SBC Confidentiality Order*, 17 FCC Rcd at 17022-23, ¶ 32.

¹⁹ *SBC Confidentiality Order*, 17 FCC Rcd at 17022-23, ¶ 32.

²⁰ Verizon Application for Review at 7-10.

²¹ See 47 C.F.R. § 0.459; see also *Verizon Confidentiality Order*, 17 FCC Rcd at 1380, ¶ 13. For a comprehensive discussion of the Commission's confidentiality rules, see *SBC Confidentiality Order*, 17 FCC Rcd at 17015-16, ¶¶ 10-11.

the reasons set forth below, we find that the Bureau correctly concluded that Verizon failed to demonstrate with specificity how disclosure of these data would likely substantially harm Verizon's competitive position.²²

8. Verizon argues that if competitors were provided the "volumes" information, they would gain insight into Verizon's success in the exchange access market in each state and obtain data on the growth rates for specific services and in specific areas.²³ We disagree. The audit report does not provide specific information about individual orders; the "volumes" data in the audit report are aggregated state-wide on a monthly basis. As the Commission explained in the *Verizon Confidentiality Order*, the information in the audit report is not raw data, but aggregated information that summarizes and reformats detailed findings.²⁴ Competitors could not derive from this aggregated data the specific information alleged by Verizon.

9. Verizon contends that the volumes data "would help [competitors] in targeting their competitive services to services and areas where Verizon is experiencing the greatest growth and to use their resources to present the strongest competitive challenge to Verizon."²⁵ Verizon does not explain precisely how competitors might use this information to accomplish these goals. Presumably, Verizon would argue that the volumes data for Verizon's 272 affiliate, reviewed over time, could show the states in which the affiliate was increasing its market share in 2001 and 2002. Verizon has not shown how this information, aggregated state-wide on a monthly basis for 2001 and 2002, would likely substantially harm its competitive position. As we concluded in the *SBC Confidentiality Order*, a competitor cannot use aggregated performance data to target specific customers in specific markets or to provide interLATA telecommunications service more efficiently.²⁶ We therefore conclude that Verizon's allegation that the 2001 and 2002 data could provide information about the section 272 affiliate's growth to competitors is insufficient to demonstrate that such data would likely substantially harm its competitive position.

10. Verizon next argues that "[i]n some instances, the data is so granular as to provide information to competitors regarding success with specific customers or bids. Knowledge of the long distance affiliates' success in attracting long distance customers and in processing orders for those customers would help competitors develop marketing strategies and plans."²⁷ The Commission rejected this argument in the *Verizon Confidentiality Order*, concluding that none of the information contained in the audit report described Verizon's long

²² It is the submitter's responsibility to explain the degree to which information is commercially sensitive (or contains trade secrets) and the manner in which the subject area could be used by competitors to inflict substantial competitive harm. 47 C.F.R. §§ 0.459(b)(3), 0.459(b)(5).

²³ Verizon Application for Review at 5.

²⁴ *Verizon Confidentiality Order*, 17 FCC Rcd at 1377-78, ¶ 8. For example, the audit report shows, by state, the number of DS1 orders by "272 affiliate," "non-272 affiliate," and "non-affiliated carriers," aggregated on a monthly basis for 2001 and 2002.

²⁵ Verizon Application for Review at 5.

²⁶ See *SBC Confidentiality Order*, 17 FCC Rcd at 17021, ¶ 26.

²⁷ Verizon Application for Review at 5.

distance marketing plans, its advertising program, or its pricing strategies.²⁸ The data at issue here similarly do not identify these facts.

11. Verizon further contends that “in some months the order volumes for non-affiliates for a specific product in a small state such as Vermont or Maine only show one order.”²⁹ Thus, competitors “could easily deduce which carrier ordered service.”³⁰ The volumes data at issue are aggregated by state and month and by class of carrier; the audit report does not identify customers, specific markets, or details about the services.³¹ Even if we assume that Verizon’s contention -- that if there is one order by a non-affiliate in one state, competitors could deduce which carrier ordered service -- is correct, Verizon has not shown how this event in 2001 or 2002 would likely substantially harm its competitive position today.

12. Verizon also contends that “the information about services obtained by Verizon’s long distance affiliates would allow competitors to evaluate the present and future business plans of those affiliates, giving them insight into the affiliate’s financial status, market plans, growth potential, and technical capabilities.”³² Verizon does not, however, explain how the performance data aggregated by state would provide this level of detailed information to competitors. In the *Verizon Confidentiality Order*, the Commission rejected the same argument, noting that Verizon did not explain how the specific information at issue would cause competitive harm.³³ Verizon’s contentions, without more, do not demonstrate how this aggregated information from 2001 and 2002 would likely give competitors insight into the affiliate’s financial status, market plans, growth potential, and technical capabilities and substantially harm Verizon’s competitive position.

13. As the Bureau observed, the purpose of the section 272(d) audit report is to assist the Commission, the state commissions, and the public in determining whether a BOC and its affiliates are complying with the section 272 requirements.³⁴ To offer meaningful comments on the audit report, the public must have access to sufficient information. Ensuring public disclosure of the information contained in the audit report is fully consistent with the underlying purpose of section 272(d) of the Act. Verizon’s attempt to redact the volumes information from the audit report would thwart this purpose.

C. Other Issues

²⁸ *Verizon Confidentiality Order*, 17 FCC Rcd at 1382, ¶ 17.

²⁹ Verizon Application for Review at 6.

³⁰ *Id.*

³¹ The services are: DS0, DS1, DS3, and OCn.

³² Verizon Application for Review at 6.

³³ *Verizon Confidentiality Order*, 17 FCC Rcd at 1381, ¶ 15.

³⁴ *Verizon Confidentiality Order*, 17 FCC Rcd at 1377-78, ¶ 7 (citing *Accounting Safeguards under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539, 17628-29, ¶ 197 (1996) (“*Accounting Safeguards Order*”), Second Order on Reconsideration, 15 FCC Rcd 1161 (2000)).

14. Verizon also contends that it does not have similar order volume information about other carriers, putting it at a disadvantage.³⁵ The Commission addressed this argument in the *Verizon Confidentiality Order*, and noted that Verizon and its affiliates will obtain the same information from other BOCs and their section 272 affiliates, although not from long distance competitors without dominant carrier affiliates.³⁶ The Commission observed that Congress required the publicly available audit report disclosing the results of the section 272(d) audit and also required public disclosure of transactions between the BOC and its section 272 affiliate.³⁷ The Commission concluded that the section 272 requirements are intended to deter misuse of the BOCs' dominant position in local markets and therefore it would not grant confidential treatment of the information in the section 272(d) audit report on the ground that Verizon and its affiliates do not have the same information about other long distance providers.³⁸ For the same reasons, we agree that the Bureau properly rejected Verizon's argument.

15. With respect to PIC change orders, Verizon argues that these data are highly sensitive due to the intensely competitive market for local exchange services and long distance services.³⁹ Verizon contends, and we agree, that the long distance market is highly competitive and consumers frequently change long distance providers.⁴⁰ Any potential harm from the disclosure of aggregated information regarding PIC change orders would be eliminated, however, because of the dated nature of the information in the audit report.⁴¹

16. Verizon claims that in prior decisions, the Commission has protected carrier demand data and traffic volume data from disclosure.⁴² The cases cited by Verizon do not, however, arise from section 272(d) audits, which, pursuant to the Act, must be made available for public inspection and comment.⁴³ First, Verizon contends that because number utilization and forecast data submitted by carriers is exempt from public disclosure, the performance measures in the section 272(d) audit should also be exempt.⁴⁴ Verizon has not shown how aggregated performance measures from 2001 and 2002 in a section 272(d) audit report should be treated in the same manner as disaggregated carrier-specific number utilization and forecast data reported

³⁵ Verizon Application for Review at 6.

³⁶ *Verizon Confidentiality Order*, 17 FCC Rcd at 1382, ¶ 18.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Verizon Application for Review at 6.

⁴⁰ *Id.* The Commission also made this observation in the *Verizon Confidentiality Order*, 17 FCC Rcd at 1382, ¶ 19.

⁴¹ See *SBC Confidentiality Order*, 17 FCC Rcd at 17017 & n.51 (rejecting SBC's confidentiality claims in light of dated nature of the information).

⁴² Verizon Application for Review at 9.

⁴³ 47 U.S.C. § 272(d)(2).

⁴⁴ Verizon Application for Review at 9, citing *Numbering Resource Optimization*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 7574, 7607, ¶ 78 (2000) ("*Numbering Report and Order*").

by carriers to allow the Commission to monitor nationwide numbering resources.⁴⁵ These data are very different and serve completely different purposes. For example, the audit report contains the volume of DS1 orders by Verizon's section 272 affiliates on a state-wide basis; the number utilization and forecast data reported by carriers are highly disaggregated and identify the quantity of assigned, intermediate, reserved, aging, and administrative numbers.⁴⁶ The information in the audit report is made public in order to allow meaningful third-party comments regarding the carrier's compliance with section 272 of the Act. The numbering data, on the other hand, is filed by carriers in order to allow the Commission to monitor nationwide number usage.

17. Verizon also contends that in the merger context, traffic volume data is deemed confidential.⁴⁷ In the cases cited by Verizon, the Cable Services and Common Carrier Bureaus adopted protective orders because they anticipated receiving additional filings that would contain confidential information such as future business plans, customer names, usage patterns, locations, and traffic volumes. The confidential nature of the data was not discussed in the Bureaus' orders; however, the information was obviously far more extensive and detailed than the data at issue here. Verizon has not shown that the data in the section 272(d) audit report is disaggregated to the same extent as the confidential data in the merger orders. Next, Verizon contends that in tariff-related proceedings, the Commission has found that disaggregated demand data are competitively sensitive.⁴⁸ In the *GCI FOIA* case cited by Verizon, the Commission found that the documents sought contained "specific cost and demand data that is highly detailed and disaggregated."⁴⁹ Verizon has not shown that the data it seeks to redact is as detailed or disaggregated as the Alascom data at issue in the *GCI FOIA* case. We conclude that Verizon has failed to show that the information it seeks to protect merits the same treatment as the data in the merger cases, numbering resources case, or the FOIA case cited.

18. Finally, we agree with the Bureau's rejection of Verizon's request to limit access to the audit information with a protective agreement. In the *Verizon Reconsideration Order* and

⁴⁵ In the *Numbering Report and Order*, the Commission codified six primary categories of number usage: assigned, intermediate, reserved, aging, administrative, and available. The Commission found that monitoring individual carrier's use of numbering resources was necessary to ensure that numbering resources are efficiently used and that the North American Numbering Plan ("NANP") is not prematurely exhausted. *Numbering Report and Order*, 15 FCC Rcd at 7593, ¶ 37.

⁴⁶ Aggregated data, such as carrier's Numbering Plan Area ("NPA")-wide utilization rate and number of NXXs (or central office codes) assigned, do not require confidential treatment. *Id.* at 7607-08, ¶ 79.

⁴⁷ Verizon Application for Review at 9, citing *Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control*, Order Adopting Protective Order, 15 FCC Rcd 6117 (Cab. Serv. Bur. 2000) and *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, Order Adopting Protective Order, 13 FCC Rcd 11166 (Com. Car. Bur. 1998); Verizon Application for Review at 10, citing *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. Transferor, to AT&T Corp., Transferee*, Order Adopting Protective Order, 14 FCC Rcd 12286 (Cab. Serv. Bur. 1999).

⁴⁸ Verizon cites *General Communications, Inc.*, FOIA Control Nos. 95-355, 95-403, 11 FCC Rcd 5373 (1996) ("*GCI FOIA*").

⁴⁹ *GCI FOIA*, 11 FCC Rcd at 5374-75, ¶ 11. For example, the information would reveal the costs and demand for various sites within the non-Bush area where GCI competes with Alascom, as well as profit margins. *Id.*

the *SBC Confidentiality Order*, the Commission rejected this same approach.⁵⁰ As the Commission explained, a protective order would run contrary to the statutory requirement to make the audit results available for public inspection and to allow any party to comment on the report.⁵¹

19. For the foregoing reasons, we find that the Bureau correctly denied Verizon's request for confidential treatment of the information contained in the section 272(d) audit report.

III. ORDERING CLAUSES

20. ACCORDINGLY, IT IS ORDERED, pursuant to sections 4(i), 220, and 272(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 220, and 272(d), and section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), the Application for Review filed on behalf of Verizon Communications, Inc. in the above-captioned proceeding is DENIED.

21. IT IS FURTHER ORDERED THAT, pursuant to sections 4(i), 220, and 272(d) of the Act, 47 U.S.C. §§ 154(i), 220, and 272(d), that the unredacted version of the final section 272(d) audit report be filed in this docket within ten days of the release of this Memorandum Opinion and Order. Interested parties will have 60 days from that date to file comments.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵⁰ *Verizon Reconsideration Order*, 17 FCC Rcd at 6956, ¶ 3; *SBC Confidentiality Order*, 17 FCC Rcd at 17024, ¶ 35.

⁵¹ *Verizon Reconsideration Order*, 17 FCC Rcd at 6956, ¶ 3.